

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT G. HELSLEY,	)	
	)	No. CV-08-00069-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

---

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 7, 2008. (Ct. Rec. 16, 23). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Terry E. Shea represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 23) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 16.)

**JURISDICTION**

Plaintiff protectively filed an application for SSI benefits on January 17, 2006. (Tr. 696-699.) On February 27, 2006, he

1 filed a Title II application. Both applications alleged onset as  
2 of January 1, 1997. (Tr. 68-70.) The applications were denied  
3 initially and on reconsideration. (Tr. 38-39, 43-45.)  
4 Administrative Law Judge (ALJ) Richard A. Say held a hearing on  
5 May 16, 2007. (Tr. 740-765.) Plaintiff, represented by counsel,  
6 medical expert Walter Scott Mabee, Ph.D., and vocational expert  
7 Deborah N. Lapoint testified. On June 2, 2007, the ALJ issued a  
8 decision finding that plaintiff was disabled, but substance abuse  
9 materially contributed to the finding, barring eligibility. (Tr.  
10 19-29.) The Appeals Council considered updated records but denied  
11 a request for review on January 8, 2008. (Tr. 5-9.) Therefore,  
12 the ALJ's decision became the final decision of the Commissioner,  
13 which is appealable to the district court pursuant to 42 U.S.C. §  
14 405(g). Plaintiff filed this action for judicial review pursuant  
15 to 42 U.S.C. § 405(g) on February 19, 2008. (Ct. Rec. 1, 4.)

#### 16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing  
18 transcript, the ALJ's decision, the briefs of both Plaintiff and  
19 the Commissioner, and will only be summarized here.

20 Plaintiff was 41 years old at the time of the hearing, has a  
21 high school equivalency diploma, and one year or two years of  
22 college. (Tr. 85, 135, 744-745.) Plaintiff has worked as a farm  
23 machine operator (driving a combine) and as a food processor.  
24 (Tr. 81, 87, 760-761.) He alleges disability as of June 1, 1997,  
25 due to depression, fatigue, medication side effects and difficulty  
26 coping with normal work stressors. (Tr. 80.) Plaintiff testified  
27 that he continues to drink. (Tr. 757.) Seroquel causes plaintiff  
28

1 to feel drowsy and "dopey," experience dry mouth, and gain weight.  
2 (Tr. 755.)

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Social Security Act (the "Act") defines "disability"  
5 as the "inability to engage in any substantial gainful activity by  
6 reason of any medically determinable physical or mental impairment  
7 which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than  
9 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
10 Act also provides that a Plaintiff shall be determined to be under  
11 a disability only if any impairments are of such severity that a  
12 plaintiff is not only unable to do previous work but cannot,  
13 considering plaintiff's age, education and work experiences,  
14 engage in any other substantial gainful work which exists in the  
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
16 Thus, the definition of disability consists of both medical and  
17 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9<sup>th</sup> Cir. 2001).

19 The Commissioner has established a five-step sequential  
20 evaluation process for determining whether a person is disabled.  
21 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
22 is engaged in substantial gainful activities. If so, benefits are  
23 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
24 not, the decision maker proceeds to step two, which determines  
25 whether plaintiff has a medically severe impairment or combination  
26 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
27 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination  
2 of impairments, the disability claim is denied. If the impairment  
3 is severe, the evaluation proceeds to the third step, which  
4 compares plaintiff's impairment with a number of listed  
5 impairments acknowledged by the Commissioner to be so severe as to  
6 preclude substantial gainful activity. 20 C.F.R. §§  
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
8 App. 1. If the impairment meets or equals one of the listed  
9 impairments, plaintiff is conclusively presumed to be disabled.  
10 If the impairment is not one conclusively presumed to be  
11 disabling, the evaluation proceeds to the fourth step, which  
12 determines whether the impairment prevents plaintiff from  
13 performing work which was performed in the past. If a plaintiff  
14 is able to perform previous work, that Plaintiff is deemed not  
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
16 At this step, plaintiff's residual functional capacity ("RFC")  
17 assessment is considered. If plaintiff cannot perform this work,  
18 the fifth and final step in the process determines whether  
19 plaintiff is able to perform other work in the national economy in  
20 view of plaintiff's residual functional capacity, age, education  
21 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish  
24 a *prima facie* case of entitlement to disability benefits.  
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
26 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
27 met once plaintiff establishes that a physical or mental  
28

1 impairment prevents the performance of previous work. The burden  
2 then shifts, at step five, to the Commissioner to show that (1)  
3 plaintiff can perform other substantial gainful activity and (2) a  
4 "significant number of jobs exist in the national economy" which  
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
6 Cir. 1984).

7 Plaintiff has the burden of showing that drug and alcohol  
8 addiction (DAA) is not a contributing factor material to  
9 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9<sup>th</sup> Cir.  
10 2001). The Social Security Act bars payment of benefits when drug  
11 addiction and/or alcoholism is a contributing factor material to a  
12 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
13 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there  
14 is evidence of DAA and the individual succeeds in proving  
15 disability, the Commissioner must determine whether the DAA is  
16 material to the determination of disability. 20 C.F.R. §§  
17 404.1535 and 416.935. If an ALJ finds that the claimant is not  
18 disabled, then the claimant is not entitled to benefits and there  
19 is no need to proceed with the analysis to determine whether  
20 substance abuse is a contributing factor material to disability.  
21 However, if the ALJ finds that the claimant is disabled, then the  
22 ALJ must proceed to determine if the claimant would be disabled if  
23 he or she stopped using alcohol or drugs.

#### 24 STANDARD OF REVIEW

25 Congress has provided a limited scope of judicial review of a  
26 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
27 the Commissioner's decision, made through an ALJ, when the  
28

1 determination is not based on legal error and is supported by  
2 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
3 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
4 1999). "The [Commissioner's] determination that a plaintiff is  
5 not disabled will be upheld if the findings of fact are supported  
6 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
7 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
8 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
9 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
10 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
11 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
12 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
13 evidence as a reasonable mind might accept as adequate to support  
14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
15 (citations omitted). "[S]uch inferences and conclusions as the  
16 [Commissioner] may reasonably draw from the evidence" will also be  
17 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
18 On review, the Court considers the record as a whole, not just the  
19 evidence supporting the decision of the Commissioner. *Weetman v.*  
20 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
21 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

22       It is the role of the trier of fact, not this Court, to  
23 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
24 evidence supports more than one rational interpretation, the Court  
25 may not substitute its judgment for that of the Commissioner.  
26 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
27 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
28

1 substantial evidence will still be set aside if the proper legal  
2 standards were not applied in weighing the evidence and making the  
3 decision. *Browner v. Secretary of Health and Human Services*, 839  
4 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
5 evidence to support the administrative findings, or if there is  
6 conflicting evidence that will support a finding of either  
7 disability or nondisability, the finding of the Commissioner is  
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
9 1987).

#### 10 **ALJ'S FINDINGS**

11 At the outset the ALJ found plaintiff was last insured  
12 through September 30, 2000, for purposes of his DIB claim. (Tr.  
13 21.) The ALJ found at step one that plaintiff has not engaged in  
14 substantial gainful activity since onset. (Tr. 22.) At steps two  
15 and three, the ALJ found that plaintiff suffers from substance  
16 abuse, depression, anxiety, and personality disorder, impairments  
17 that are severe. Relying on Dr. Mabee's testimony, the ALJ found  
18 that at step three, when DAA is included, plaintiff's impairments  
19 meet the requirements of Listings 12.04, 12.08 and 12.09. (Tr.  
20 26.) The ALJ found plaintiff disabled, and performed an analysis  
21 pursuant to *Bustamante*<sup>1</sup> to determine whether plaintiff would be  
22 disabled if he stopped abusing substances. (Tr. 28.) The ALJ  
23 found that when substance abuse is excluded, plaintiff's remaining  
24 limitations would cause more than a minimal impact on his ability  
25 to perform basic work activities, but would not rise to Listings  
26 level impairment. (Tr. 26, alternate steps two and three.) In

---

27 <sup>1</sup>*Bustamante v. Massanari*, 262 F. 3d 949 (9<sup>th</sup> Cir. 2001).  
28

1 assessing plaintiff's alternate RFC, the ALJ found plaintiff less  
2 than fully credible. (Tr. 28.) If plaintiff stopped abusing  
3 substances, the ALJ found plaintiff would have the residual  
4 functional capacity to perform a full range of exertional  
5 activities. (Tr. 26.) With respect to mental impairment when DAA  
6 is excluded, the ALJ found plaintiff is capable of understanding,  
7 remembering, and carrying out short and simple instructions, and  
8 of superficial interaction with the general public and coworkers.  
9 He takes medication for relief of symptoms, but is able to remain  
10 reasonably alert to perform required job functions. (Tr. 26.)  
11 Relying on the VE's testimony, the ALJ found at the alternate (DAA  
12 excluded) step four that plaintiff can perform his past relevant  
13 work as an agricultural produce sorter and store laborer. (Tr.  
14 28.) ALJ Say found that because plaintiff would not be disabled  
15 if he stopped substance use, DAA is a contributing factor material  
16 to the determination of disability. Accordingly, he found  
17 plaintiff is barred from receiving benefits under the Social  
18 Security Act. (*Id.*)

#### 19 ISSUES

20 Plaintiff contends that the Commissioner erred as a matter of  
21 law by finding that plaintiff would be able to work if not abusing  
22 substances, citing *Bustanmante* as support. Plaintiff alleges that  
23 the ALJ's erroneous finding occurred because he failed to properly  
24 credit the opinions of reviewing consultant Rita Flannagan, Ph.  
25 D., and testifying medical expert, Scott Mabee, Ph.D. (Ct. Rec. 17  
26 at 11-16.)

27 The Commissioner responds that the ALJ appropriately weighed  
28



1 the medical evidence and asks that the decision be affirmed. (Ct.  
2 Rec. 24 at 2.)

### 3 DISCUSSION

#### 4 A. Weighing medical evidence

5 In social security proceedings, the claimant must prove the  
6 existence of a physical or mental impairment by providing medical  
7 evidence consisting of signs, symptoms, and laboratory findings;  
8 the claimant's own statement of symptoms alone will not suffice.  
9 20 C.F.R. § 416.908. The effects of all symptoms must be  
10 evaluated on the basis of a medically determinable impairment  
11 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
12 416.929. Once medical evidence of an underlying impairment has  
13 been shown, medical findings are not required to support the  
14 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
15 341, 345 (9<sup>th</sup> Cr. 1991).

16 A treating physician's opinion is given special weight  
17 because of familiarity with the claimant and the claimant's  
18 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
19 Cir. 1989). However, the treating physician's opinion is not  
20 "necessarily conclusive as to either a physical condition or the  
21 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
22 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
23 a treating physician than an examining physician. *Lester v.*  
24 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
25 weight is given to the opinions of treating and examining  
26 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
27 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
28

1 physician's opinions are not contradicted, they can be rejected  
2 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
3 If contradicted, the ALJ may reject an opinion if he states  
4 specific, legitimate reasons that are supported by substantial  
5 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
6 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

7 In addition to the testimony of a nonexamining medical  
8 advisor, the ALJ must have other evidence to support a decision to  
9 reject the opinion of a treating physician, such as laboratory  
10 test results, contrary reports from examining physicians, and  
11 testimony from the claimant that was inconsistent with the  
12 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
13 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
14 Cir. 1995).

15 Plaintiff contends that the ALJ erred when he weighed the  
16 opinions of Drs. Flannagan and Mabee.

17 Because the ALJ found plaintiff disabled, the issue on review  
18 is whether he applied the correct legal standards and substantial  
19 evidence supported his determination that DAA is material to the  
20 disability determination; i.e., whether plaintiff would be  
21 disabled if substance abuse ceased.

22 DAA

23 To determine if plaintiff would still be disabled if  
24 substance abuse stopped, the ALJ noted that no psychiatrist or  
25 psychologist has opined plaintiff is unable to work. Although  
26 plaintiff testified that he began experiencing mental problems  
27 (including mood swings and fatigue) in 1997, the ALJ found this is  
28 not supported by the record. There is no evidence to support any

1 severe mental impairment before plaintiff's second hospitalization  
 2 in July of 2005, other than records of his chemical dependency  
 3 treatment. (Tr. 28.)

4 The ALJ found plaintiff's repeated hospitalizations have been  
 5 "related to alcohol abuse with concomitant suicidal ideation."  
 6 (Tr. 28.) The ALJ notes plaintiff was admitted to ESH in 1989  
 7 after threatening suicide and his mother. He was drinking daily  
 8 for 2-3 weeks, consuming about one fifth of whiskey in 24 hours.  
 9 (Tr. 22, referring to Exhibit 12F.) The ALJ notes plaintiff  
 10 threatened to kill himself and his family prior to hospitalization  
 11 beginning July 13, 2005. His blood alcohol was .26. (Tr. 22,  
 12 referring to Exhibit 1F; Tr. 131, 176.) Police found plaintiff on  
 13 a rooftop on July 29, 2005. His blood alcohol was .349.  
 14 Plaintiff said his memory of the event was impaired but he thought  
 15 may have threatened to jump. (Tr. 23, referring to Exhibit 3F;  
 16 Tr. 179, 183.) In an exhibit admitted by the Appeals Council but  
 17 not provided to the ALJ, on January 24, 2007, plaintiff stated he  
 18 "swallowed a bunch of pills and I was drinking heavily." (Tr.  
 19 522.)

20 The ALJ observes that the Global Assessments of Functioning<sup>2</sup>

---

21  
 22 <sup>2</sup>A GAF (Global Assessment of Functioning) of 61-70  
 23 indicates some mild symptoms (e.g., depressed mood and mild  
 24 insomnia) or some difficulty in social, occupational, or  
 25 school functioning (e.g., occasional truancy, or theft within the  
 26 household), but generally functioning pretty well, has  
 27 some meaningful interpersonal relationships. A GAF of 51-60  
 28 indicates moderate symptoms (e.g., flat affect and circumstantial  
 speech, occasional panic attacks) or moderate difficulty in social,  
 occupational or school functioning (e.g., few friends, conflicts  
 with peers or co-workers. DIAGNOSTIC  
 AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION  
 (DSM-IV), at p. 32.

1 made after plaintiff completed treatment indicate only mild  
2 symptoms in social or occupational functioning. (See e.g., GAF of  
3 70 at Tr. 650; GAF of 55-65 at Tr. 195; GAF highest past year  
4 (2006) of 65 at Tr. 430, 433.) Not noted by the ALJ but further  
5 supporting his conclusion is plaintiff's statement during his July  
6 13, 2005 hospitalization that after alcohol treatment he felt well  
7 for a week and then relapsed. (Tr. 131.)

8       The ALJ observes that while personality disorders are by  
9 definition long-standing, plaintiff has been able to work in the  
10 past with his psychological disorder [variously diagnosed as  
11 depressive disorder, dysthymia, and, most recently, borderline  
12 personality disorder]. (Tr. 28.) Plaintiff alleges onset from  
13 June of 1997 but reported he worked for two years as a food  
14 processor, from 1992 through 1994, when presumably his personality  
15 disorder existed. (Tr. 81.)

16       The ALJ points out plaintiff's depression and anxiety have  
17 been exacerbated by his alcohol abuse, as noted by several medical  
18 professionals. The ALJ cites as an example the December 2005  
19 opinion of examining psychologist John Tran, M.D., that when  
20 plaintiff binged on alcohol he stopped taking prescribed  
21 psychotropic medication and his symptoms were much worse. (Tr.  
22 28, referring to Tr. 240.) The ALJ notes plaintiff reported he  
23 began drinking at age 15. He also reported his depression began  
24 at age 15.

25       The ALJ considered consulting agency psychologist Dr.  
26 Flannagan's opinion that plaintiff is capable of uncomplicated  
27 work with limited public interaction. (Tr. 28, referring to Tr.  
28 215.) The ALJ notes that he considered evidence received after

1 Dr. Flannagan's April 17, 2006 opinion, including the hearing  
2 testimony. (Tr. 28.) In assessing plaintiff's RFC, ALJ Say found  
3 plaintiff is capable of understanding, remembering, and carrying  
4 out short and simple instructions and of superficial interaction  
5 with the public and co-workers. (Tr. 26.) These limitations are  
6 consistent with Dr. Flannagan's narrative opinion.

7 The Commissioner is correct that ALJ Say's analysis is  
8 consistent with the approach approved recently by *Stubbs-Danielson*  
9 *v. Astrue*, 539 F. 3d 1169 (9<sup>th</sup> Cir. 2008):

10 The ALJ translated Stubb-Danielson's condition,  
11 including the pace and mental limitations, into  
12 the only concrete restrictions available to him  
13 - Dr. Easter's recommended restriction to "simple  
14 tasks." This does not, as [plaintiff] contends,  
15 constitute a rejection of Dr. McCollum's opinion.  
16 Dr. Easter's assessment is consistent with Dr.  
17 McCollum's 2005 MRFC, which found [plaintiff]  
18 is "not significantly limited" in her ability to  
19 "carry out very short simple instructions,"  
20 "maintain attention and concentration for extended  
21 periods," and sustain an ordinary routine without  
22 special supervision.

23 *Stubbs-Danielson*, 539 F. 3d at 1174. The Court noted that an  
24 ALJ's assessment of a claimant adequately captures restrictions  
25 related to concentration, persistence or pace where the  
26 assessment is consistent with restrictions identified in the  
27 medical testimony. (*Id.*) The ALJ's RFC and hypothetical  
28 incorporated restrictions consistent with the medical evidence.  
To aid in weighing the evidence, the ALJ evaluated plaintiff's  
credibility and found him less than fully credible - an assessment  
not challenged on appeal. (Tr. 28.) Credibility determinations  
bear on evaluations of medical evidence when an ALJ is presented  
with conflicting medical opinions or inconsistency between a  
claimant's subjective complaints and diagnosed condition. See

1 *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

2       It is the province of the ALJ to make credibility  
3 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
4 1995). However, the ALJ's findings must be supported by specific  
5 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
6 Cir. 1990). Once the claimant produces medical evidence of an  
7 underlying medical impairment, the ALJ may not discredit testimony  
8 as to the severity of an impairment because it is unsupported by  
9 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
10 1998). Absent affirmative evidence of malingering, the ALJ's  
11 reasons for rejecting the claimant's testimony must be "clear and  
12 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
13 "General findings are insufficient: rather the ALJ must identify  
14 what testimony not credible and what evidence undermines the  
15 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
16 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

17       The ALJ relied on several factors when he assessed  
18 credibility, including the lack of any evidence of severe  
19 impairment from the date of onset (June 1, 1997) until July of  
20 2005 (except chemical dependency treatment), contrary to  
21 plaintiff's assertions. (Tr. 28.) The ALJ notes plaintiff's  
22 testimony of his daily activities: he attends intensive treatment  
23 courses five days a week, cares for personal needs, does laundry,  
24 cooks, shops, and drives. He goes to the library often and gets  
25 books and videos on a wide variety of subjects, including  
26 documentaries, wildlife, nutrition, and dogs. (Tr. 28, referring  
27 to Tr. 749-750.) He goes to AA meetings or the grocery store just  
28 to be around other people, watches television and draws. (Tr. 28,

1 referring to Tr. 751-752.) The ALJ notes plaintiff indicated  
2 antidepressants have helped him. (Tr. 28, referring to Tr. 755.)

3 The ALJ considered Dr. Mabee's testimony. (Tr. 26, referring  
4 to Tr. 741-744.) Dr. Mabee reviewed the record and opined that  
5 mid 2006 through late 2006, plaintiff's primary diagnosis is  
6 alcohol dependence, although there are references to mood and  
7 personality difficulties. Throughout the record, Dr. Mabee noted,  
8 plaintiff was consistently diagnosed with alcohol dependency and  
9 relapse. (Tr. 642.) Dr. Mabee opined that plaintiff's condition  
10 meets the requirements of Listing 12.09, substance disorders, when  
11 DAA is included. (Tr. 743.) He opined that he could not separate  
12 plaintiff's mood and personality difficulties from his alcohol  
13 dependence. (Tr. 744.)

14 Plaintiff relies on *Bustamante* for the proposition that the  
15 ALJ should have found plaintiff unable to work when DAA is  
16 excluded due to the seriousness of his mental illness. *Bustamante*  
17 is distinguishable. The ALJ erred by determining that Mr.  
18 Bustamante's mental impairments were "the product and consequence  
19 of his alcohol abuse" before making a disability determination  
20 pursuant to the five step sequential evaluation; to the extent he  
21 found Mr. Bustamante's mental impairments were not severe  
22 regardless of alcoholism, the conclusion was not supported by  
23 substantial evidence, and the Court remanded for a new five step  
24 analysis beginning with step three, instructing the ALJ to conduct  
25 the analysis without first separating out the impact of alcohol  
26 abuse. *Bustamante*, 262 F. 2d at 954-956.

27 Unlike the ALJ in *Bustamante*, ALJ Say first determined  
28 plaintiff is disabled at step three when DAA is included. He then

1 performed the mandatory alternate sequential evaluation to  
2 determine if plaintiff would still be disabled if DAA is stopped.

3 As indicated, ALJ Say found plaintiff's mental impairments of  
4 depression, anxiety, and personality disorder severe at step two  
5 without DAA, because he found they would cause more than minimal  
6 impairment. (Tr. 22.) He notes plaintiff was assessed with  
7 normal cognitive functioning, intelligence within normal limits,  
8 and good memory. In contrast, Mr. Bustamante was assessed, in  
9 part, with moderate to severe depressive features, and with marked  
10 impairment in activities of daily living, cognitive functioning,  
11 and interpersonal relations. ALJ Say's legal analysis is without  
12 error. He was not presented with a clear record of marked  
13 impairment when DAA is excluded, unlike the record in *Bustamante*.

14 The ALJ is responsible for reviewing the evidence and  
15 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
16 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
17 trier of fact, not this court, to resolve conflicts in evidence.  
18 *Richardson*, 402 U.S. at 400. The court has a limited role in  
19 determining whether the ALJ's decision is supported by substantial  
20 evidence and may not substitute its own judgment for that of the  
21 ALJ, even if it might justifiably have reached a different result  
22 upon de novo review. 42 U.S.C. § 405 (g).

23 The ALJ provided clear and convincing reasons for finding  
24 plaintiff's allegations not fully credible. The ALJ weighed the  
25 medical evidence and found plaintiff disabled when DAA is  
26 included. The ALJ weighed the evidence as a whole and concluded  
27 plaintiff would have be able to perform some simple work with  
28 limited public and co-worker interaction if DAA is excluded.



1  
2 The ALJ's assessment of the medical and other evidence is  
3 supported by the record and free of legal error.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this  
6 court finds that the ALJ's decision is free of legal error and  
7 supported by substantial evidence..

8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
12 **DENIED.**

13 The District Court Executive is directed to file this Order,  
14 provide copies to counsel for Plaintiff and Defendant, enter  
15 judgment in favor of Defendant, and **CLOSE** this file.

16 DATED this 8th day of December, 2008.

17 s/ James P. Hutton

18 JAMES P. HUTTON  
19 UNITED STATES MAGISTRATE JUDGE  
20  
21  
22  
23  
24  
25  
26  
27  
28